Summit Domain Sdn Bhd & Anor v Carillon Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-02 (NCvC) (W)-2540–12 OF 2017
ABANG ISKANDAR, BADARIAH SAHAMID AND HARMINDAR SINGH JJCA
19 NOVEMBER 2019

Contract — Contingent contract — Non-fulfilment of condition precedent — Agreement ('SPA') for sale of land conditional upon seller's dispute with third parties over the land being finally resolved in its favour in the courts — Date when condition precedent would be fulfilled beyond power of parties to SPA to ascertain — SPA allowed buyer option at end of one year from date of SPA to either extend time for condition precedent to be fulfilled or to terminate agreement — Buyer opted to grant extension of time but in same letter to seller reserved right to terminate SPA at any time — Seller did not object to letter — Whether seller deemed to have accepted buyer's right to terminate at any time during extended period if condition precedent continued to remain unfulfilled — Whether buyer entitled to terminate SPA without giving seller reasonable notice of termination — Whether requirement of reasonable notice did not apply to contingent contracts — Whether under s 33 of Contracts Act 1950 if contingent event did not happen within stipulated time contract became void without notice

The first appellant ('A1') had entered into a sale and purchase agreement ('SPA') to buy a piece of land from the respondent ('Carillon'). At the time the SPA was signed, the land was the subject of a court-action ('suit 158') in which three *orang asli* had sued Carillon and 12 others for a declaration that they held customary rights over the subject land and lands adjoining it. The second schedule of the SPA provided that the SPA was conditional upon A1's solicitors receiving a copy of the 'Final Decision of the Court' ('the conditional period'). It was only when the solicitors had received that document that the SPA was to become unconditional and capable of being performed to its conclusion. The phrase 'Final Decision of the Court' was defined in cl 1.1 of the SPA as 'the final and conclusive judgment or order reached by the trial court or any appellate or Federal Court ... in favour of the Vendor (Carillon) ... in respect of Suit 158 ... with no further right of appeal whatsoever'. The second schedule further stated that if there was no final decision of the court and/or judicial decision in favour of Carillon within one year from the date of the SPA, A1 had the option to either extend the conditional period or terminate the SPA. A1 had paid Carillon an earnest deposit of RM1m while the balance deposit of RM12,754.447.70 under the SPA was held by A1's solicitors as stakeholders pending their receipt of a copy of the final decision of the court. Upon the expiry of one year from the date of the SPA, and there being no copy of the final

decision of the court received by A1's solicitors, A1 notified Carillon by letter that it was exercising its option to extend the conditional period but, at the same time, reserved its right to terminate the SPA at any time. Five months later, A1 notified Carillon that it was terminating the SPA with immediate effect. Two years after the termination, the High Court dismissed suit 158 but both sides appealed against the decision to the Court of Appeal. The appellants, meanwhile, sued Carillon for rescission of the SPA and for refunds of the RM1m earnest deposit and another RM573,950.16 which the second appellant director of A1 had paid as interest on the balance of the deposit. Carillon counterclaimed for, inter alia, declarations that the termination of the SPA was null and void and that the SPA was still valid and enforceable; an order for specific performance of the SPA and damages for breach of contract. The High Court dismissed the appellants' claim and allowed Carillon's counterclaim. It held that: (a) by extending the conditional period without fixing a time for performance, A1 had set the time for performance of the SPA at large and time ceased to be of the essence of the contract; (b) A1's failure to give reasonable notice before terminating the SPA rendered the termination unlawful and invalid and contrary to s 47 of the Contracts Act 1950; (c) the SPA was still valid and subsisting and was capable of being specifically performed; and (d) notwithstanding that the High Court's decision in suit 158 was pending, the decision was nevertheless a final judgment that could be construed as satisfying the condition precedent in the SPA. On the ground that the High Court had erred in all its holdings in (a)–(d) above, the appellants in the instant appeal sought for the decision to be set aside, their claim to be allowed and the counterclaim to be dismissed.

Held, allowing the appeal, setting aside the decision of the High Court, allowing the appellants' claim and dismissing the respondent's counterclaim:

(1) The termination of the SPA was lawful as the agreement was conditional upon the occurrence of the contingent event, ie, the receipt by A1's solicitors of a final decision in respect of the dispute between the *orang asli* plaintiffs and Carillon over the subject land in suit 158. Since the contingent event did not materialise, the SPA lapsed. Alternatively, even if there was a subsisting SPA, A1 had lawfully elected to exercise the option to terminate the SPA (see para 68).

(2) Since no timeline was stipulated as to when the 'Final Decision of the Court' would take place — which was beyond the power of the parties to ascertain — cl 5 of the second schedule of the SPA gave A1 the option to either extend the time for performance of the SPA or to terminate the agreement if a final decision in favour of Carillon was not given within a year from the date of the SPA. The phrase 'Final Decision of Court' was expressly defined in cl 1.1 of the SPA to be the final and conclusive judgment or order reached by the trial court or any appellate or Federal court in favour of Carillon of the dispute in suit 158 with no further right

of appeal whatsoever. Since both sides in suit 158 had appealed to the Court of Appeal against the High Court's verdict in that suit and the appeals were pending, the dispute over the ownership of the subject land had not reached a final decision or been conclusively determined in Carillon's favour. The High Court judge therefore erred in finding that the High Court's judgment in suit 158 was 'a final judgment notwithstanding the same is under appeal' (see paras 47, 55 & 57–58).

(3) By not protesting or disputing the terms stated in A1's letter of extension of the SPA — which at the same time expressly reserved to A1 the right to terminate the agreement — Carillon was deemed to have accepted the reservation aforesaid and as having acknowledged A1's right to terminate the SPA during the extended period if a final decision in suit 158 continued to be unavailable. The contingency in the SPA was a fundamental factor and was likely the rationale for the parties agreeing that the contingency status would not remain indefinitely but could be terminated by A1 after the expiry of one year from the date of the SPA (see paras 50–52).

(4) The High Court's order granting specific performance of the SPA was clearly unmaintainable in law as the contingent event in the SPA remained unfulfilled, namely, the dispute as to the ownership of the subject land remained unresolved with the two appeals pending in the Court of Appeal. The High Court judge failed to appreciate that Carillon was not in a position to deliver an unencumbered title or unencumbered vacant possession of the subject land to A1 (see paras 62 & 68).

(5) The High Court erred in holding that A1's termination of the SPA was unlawful because it failed to give reasonable notice of termination as envisaged by s 47 of the Contracts Act 1950 ('the CA'). The requirement of reasonable notice did not apply to contingent contracts. By s 33 of the CA, if the contingent event did not happen within the stipulated time, the contract became void without notice. Conversely, if the contingent event occurred, the contract would proceed for performance on its express terms. A conditional contract subsisted without the need for any notice to be given. In any event, the judge had wrongly invoked s 47 of the CA as the same was not concerned with the giving of reasonable notice of termination but with time for performance (see paras 63–65).

[Bahasa Malaysia summary

Perayu pertama ('A1') telah memasuki perjanjian jual beli ('PJB') untuk membeli sebidang tanah daripada responden ('Carillon'). Pada masa PJB ditandatangani, tanah itu adalah subjek tindakan mahkamah ('guaman 158') di mana tiga orang asli telah menyaman Carillon dan 12 yang lain untuk pengisytiharan bahawa mereka memegang hak-hak adat atas tanah subjek dan tanah bersebelahannya. Jadual kedua PJB menyatakan PJB adalah bersyarat

apabila peguam A1 yang menerima salinan 'Keputusan Akhir Mahkamah' ('tempoh bersyarat'). Ia hanya apabila peguam telah menerima dokumen itu bahawa PJB menjadi tidak bersyarat dan mampu dilaksanakan kepada kesimpulannya. Frasa 'Keputusan Akhir Mahkamah' ditakrifkan di dalam klausa 1.1 PJB sebagai 'penghakiman akhir atau muktamad atau perintah yang dicapai oleh mahkamah bicara atau mana-mana rayuan atau Mahkamah Persekutuan ... memihak kepada Vendor (Carillon) ... berkenaan dengan guaman 158 ... tanpa hak rayuan seterusnya'. Jadual kedua selanjutnya menyatakan bahawa jika tidak ada keputusan akhir mahkamah dan/atau keputusan kehakiman yang memihak kepada Carillon dalam tempoh satu tahun dari tarikh PJB, A1 mempunyai pilihan sama ada untuk melanjutkan tempoh bersyarat atau menamatkan PJB. A1 telah membayar Carillon deposit cengkeram sebanyak RM1 juta manakala baki deposit sebanyak RM12,754.447.70 di bawah PJB telah dipegang oleh peguam A1 sebagai pihak berkepentingan sementara menunggu salinan keputusan akhir mahkamah. Apabila tamat satu tahun dari tarikh PJB, dan tidak ada salinan keputusan akhir mahkamah yang diterima oleh peguam A1, A1 memberitahu Carillon melalui surat bahawa ia telah melaksanakan pilihannya untuk melanjutkan tempoh bersyarat tetapi, pada masa yang sama, memelihara haknya untuk menamatkan PJB pada bila-bila masa. Lima bulan kemudian, A1 memberitahu Carillon bahawa ia menamatkan PJB dengan serta-merta. Dua tahun selepas penamatan, Mahkamah Tinggi menolak guaman 158 tetapi kedua-dua pihak merayu terhadap keputusan itu kepada Mahkamah Rayuan. Sementara itu, perayu menyaman Carillon kerana membatalkan PJB dan untuk pembayaran balik deposit cengkeram RM1 juta dan satu lagi RM573,950.16 yang mana perayu kedua pengarah A1 telah membayar sebagai faedah atas baki deposit tersebut. Carillon menuntut balas untuk, antara lain, pengisytiharan bahawa penamatan PJB adalah batal dan tidak sah dan PJB masih sah dan boleh dikuatkuasakan; suatu perintah untuk pelaksanaan spesifik PJB dan ganti rugi kerana melanggar kontrak. Mahkamah Tinggi menolak tuntutan perayu dan membenarkan tuntutan balas Carillon. Ia memutuskan bahawa: (a) dengan memperluaskan tempoh bersyarat tanpa menetapkan masa untuk pelaksanaan, A1 telah menetapkan masa untuk pelaksanaan PJB adalah bebas dan masa tidak lagi menjadi intipati kontrak; (b) kegagalan A1 untuk memberikan notis yang munasabah sebelum menamatkan PJB membuatkan penamatan itu melanggar undang-undang dan tidak sah dan bertentangan dengan s 47 Akta Kontrak 1950; (c) PJB masih sah dan wujud dan mampu dilaksanakan secara khusus; and (d) walaupun keputusan Mahkamah Tinggi dalam guaman 158 masih belum selesai, keputusan itu adalah penghakiman terakhir yang boleh ditafsirkan sebagai memenuhi syarat terdahulu dalam PJB. Atas alasan bahawa Mahkamah Tinggi telah salah dalam semua keputusannya dalam (a)–(d) di atas, perayu dalam rayuan ini meminta keputusan untuk diketepikan, tuntutan mereka dibenarkan dan tuntutan balas itu untuk ditolak.

Diputuskan, membenarkan rayuan, mengetepikan keputusan Mahkamah Tinggi, membenarkan tuntutan perayu dan menolak tuntutan balas Carillon:

(1) Penamatan PJB adalah sah kerana perjanjian itu bersyarat apabila terjadinya peristiwa kontinjen, iaitu, penerimaan oleh peguam A1 tentang keputusan akhir berkenaan dengan perselisihan antara plaintif orang asli dan Carillon atas tanah subjek dalam guaman 158. Oleh kerana peristiwa kontinjen tidak berlaku, PJB telah berlalu. Selain itu, walaupun jika wujud PJB, A1 telah memilih secara sah untuk melaksanakan pilihan untuk menamatkan PJB (lihat perenggan 68).

(2) Memandangkan tiada garis masa ditetapkan apabila 'Keputusan Akhir Mahkamah' akan berlaku — yang berada di luar kuasa pihak-pihak untuk memastikan — klausa 5 jadual kedua PJB memberi A1 pilihan sama ada untuk memanjangkan masa untuk pelaksanaan PJB atau untuk menamatkan perjanjian jika keputusan akhir yang memihak kepada Carillon tidak diberikan dalam tempoh setahun dari tarikh PJB. Ungkapan 'Keputusan Akhir Mahkamah' secara jelas ditakrifkan dalam klausa 1.1 PJB untuk menjadi penghakiman akhir atau muktamad atau perintah yang dicapai oleh mahkamah bicara atau mana-mana rayuan atau mahkamah Persekutuan yang memihak kepada Carillon dalam pertikaian dalam guaman 158 tanpa hak merayu seterusnya. Oleh kerana kedua-dua pihak dalam guaman 158 telah merayu kepada Mahkamah Rayuan terhadap keputusan Mahkamah Tinggi dalam guaman itu dan rayuan masih belum selesai, pertikaian mengenai pemilikan tanah subjek tidak mencapai keputusan muktamad atau telah ditentukan secara konsisten dalam memihak kepada Carillon. Oleh itu, hakim Mahkamah Tinggi terkhilaf dalam membuat keputusan bahawa penghakiman Mahkamah Tinggi di guaman 158 adalah 'penghakiman muktamad walau apa pun yang sama ada di bawah rayuan' (lihat perenggan 47, 55 & 57–58).

(3) Dengan tidak membantah atau mempertikaikan syarat-syarat yang dinyatakan dalam surat pelanjutan PJB A1 — yang pada masa yang sama dengan jelas mengekalkan kepada A1 hak untuk menamatkan perjanjian — Carillon dianggap telah menerima syarat yang disebutkan di atas dan telah mengakui hak A1 untuk menamatkan PJB dalam tempoh lanjutan jika keputusan akhir dalam guaman 158 terus tidak tersedia. Kontinjensi di dalam PJB adalah faktor asas dan kemungkinan rasional bagi pihak-pihak yang bersetuju bahawa status kontingensi tidak akan kekal selama-lamanya tetapi boleh ditamatkan oleh A1 selepas tamat satu tahun dari tarikh PJB (lihat perenggan 50–52).

(4) Perintah Mahkamah Tinggi yang memberikan pelaksanaan spesifik PJB jelas tidak dapat dipertahankan dalam undang-undang kerana peristiwa kontinjen di PJB tidak dipenuhi, iaitu, pertikaian mengenai pemilikan tanah subjek masih belum dapat diselesaikan dengan dua rayuan yang

belum selesai di Mahkamah Rayuan. Hakim Mahkamah Tinggi gagal untuk menghargai bahawa Carillon tidak berada dalam kedudukan untuk memberikan hakmilik tanpa halangan atau milikan kosong tanah subjek kepada A1 (lihat perenggan 62 & 68).

(5) Mahkamah Tinggi terkhilaf dalam memutuskan bahawa penamatan PJB adalah melanggar undang-undang kerana ia gagal memberikan notis penamatan yang wajar seperti yang dinyatakan oleh s 47 Akta Kontrak 1950 ('Akta'). Keperluan notis yang munasabah tidak digunakan untuk kontrak kontinjen. Melalui s 33 Akta, sekiranya peristiwa kontinjen tidak berlaku dalam masa yang ditetapkan, kontrak itu menjadi tidak sah tanpa notis. Sebaliknya, jika peristiwa kontinjen berlaku, kontrak akan diteruskan untuk pelaksanaan pada termanya yang nyata. Kontrak bersyarat wujud tanpa sebarang notis yang perlu diberikan. Dalam apa jua keadaan, hakim telah salah menggunapakai s 47 Akta kerana ia tidak berkenaan dengan pemberian notis penamatan yang munasabah tetapi dengan masa untuk pelaksanaan (lihat perenggan 63–65).]

Cases referred to

Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 MLJ 441, FC (refd)
Ideal City Development Sdn Bhd v Dynamic Mould Sdn Bhd [2003] 3 MLJ 152, CA (refd)
National Land Finance Co-operative Society Ltd v Sharidal Sdn Bhd [1983] 2 MLJ 211, FC (refd)
Sime Hok Sdn Bhd v Soh Poh Sheng [2013] 2 MLJ 149, FC (refd)
Yong Toi Mee & Anor v Malpac Capital Sdn Bhd & Anor [2013] 6 MLJ 453; [2013] 8 CLJ 725, FC (refd)

Legislation referred to

Companies Act 1965
Contracts Act 1950 ss 32, 33, 47

Appeal from: Suit No 22NCvC-198–12 of 2015 (High Court, Johor Bahru)

Cyrus V Das (Richard WG Lee, Shiyamala Devi Manokaran, Michelle Wong Sook King with him) (Jeff Leong, Poon & Wong) for the first and second appellant.
Wong Kim Fatt (Vasanthan and Wong Boon Chong with him) (Julie Lim, Vasanthan & Co) for the respondent.

Badariah Sahamid JCA (delivering judgment of the court):

[1] This is an appeal against the decision of the learned judicial commissioner ('JC'), who on 27 February 2018 dismissed the plaintiff's claim and allowed the defendant's counterclaim with costs.

[2] The plaintiff's claim against the defendant is for rescission of a sale and purchase agreement ('SPA') and the repayment of earnest deposit and refund of interest. The defendant had filed a counterclaim on the premise that the purported termination of the SPA was unlawful and prayed for a declaration that the said SPA is valid and enforceable, an order for specific performance of the said SPA and damages for breach of contract.

[3] For ease of reference parties will be referred to as they were in proceedings before the High Court. The first plaintiff is the purchaser of the subject land, while the defendant is the vendor.

BACKGROUND FACTS

[4] The salient facts in this suit is not disputed and is derived primarily from the learned JC's judgment.

[5] The first plaintiff is a company incorporated pursuant to the Companies Act 1965 with a registered address at 12A, Jalan Sahabat 1, Taman Emas, 86000 Kluang, Johor.

[6] The second plaintiff is an individual who at all material times is a director and 50% shareholder of the plaintiff.

[7] The defendant is a company incorporated pursuant to the Companies Act 1965 with a registered address at Suite 1301, Tingkat 13, City Plaza Jalan Tebrau 80300 Johor Bahru, and Johor.

[8] By a sale and purchase agreement dated 23 December 2013 ('the said SPA') the defendant agreed to sell to the first plaintiff a piece of land held under GM 365 Lot 13, Mukim Pulai, Daerah Johor Bahru, Johor ('the subject land') for the purchase price of RM127,544,477.

[9] As set out in the Second Schedule, the said SPA is a conditional sale and purchase agreement. This is due to the fact that before the said SPA was signed, three *orang asli* have sued the defendant and 12 other parties in the Johor Bahru High Court Civil Suit No 22-NCVC-158–06 of 2013 ('the said civil suit 158') in relation to the subject land. In the said civil suit 158, the three *orang asli* have sued for a declaration that they are the holders of customary rights of the subject land and the adjoining lands.

[10] In cl 2 of the Second Schedule, it is provided that the sale and purchase therein, 'shall be conditional upon the First Plaintiff's solicitor's receipt of a copy of the Final Decision of Court' (conditional period). In cl 1.1 of the said SPA, the 'Final Decision of Court' is defined as 'the final and conclusive

judgment or order reached by the trial court or any Appellate or Federal courts in Malaya in favour of the Vendor in respect of (the said Civil Suit 158) against the Vendor and 12 others by (the three *orang asli*) with no further right of appeal whatsoever'.

[11] Further, cl 4 of the Second Schedule, provides that the said SPA 'shall become unconditional on the date the Final Decision of Court, is received by the First Plaintiff's Solicitors'.

[12] Therefore, by reason of cll 2 and 4 of the Second Schedule, the said SPA only becomes an unconditional contract if a condition precedent has been fulfilled. The condition precedent ('the said condition precedent') is the receipt of the final decision of court in the said civil suit 158 by the first plaintiff's Solicitors.

[13] Clause 5 of the Second Schedule provides that , 'if there is no Final Decision of Court and or judicial decision in favour of the Vendor within one (1) year from the date of this Agreement, the Purchaser shall either have the option to extend the Conditional Period or have the option to terminate this Agreement and upon notice being given to the Vendor, this Agreement shall terminate and be of no further force or effect and the Vendor shall within fourteen (14) days thereof refund to the Purchaser all sums paid by the Purchaser to the Vendor free of interest ...'.

[14] Thus, cl 5 abovementioned further provided that in the event that there is no final decision of the court in the said civil suit 158 and or judicial decision in favour of the vendor (defendant) within one year from the date of the said SPA, the first plaintiff (purchaser) shall either have the option to either extend the conditional period or terminate the said SPA.

[15] According to cl 9 of the First Schedule of the said SPA, the deposit to be paid by the first plaintiff is RM13,754,447.70 comprising of: (a) an earnest deposit of RM1m; and (b) a balance deposit of RM12,754,447.70.

[16] As stated in cl 2.2 (a) of the said SPA, the earnest deposit of RM1m was already paid before the SPA was signed.

[17] By a memorandum of understanding dated 23 December 2013 ('MOU'), it was agreed between the defendant and the first plaintiff's director that if the balance deposit of RM12,754,447.70 was not paid by the first plaintiff, the second plaintiff as director of the first plaintiff undertakes to pay the said sum when the agreement becomes unconditional. In addition, the second plaintiff agrees to pay to the plaintiff interest on the balance of the deposit at the rate of 3%pa, payable every two months in advance.

[18] The said SPA is subject to the condition that the 'Final Decision of Court' in the said civil suit 158 and or judicial decision in favour of the defendant shall be obtained within one year from the date of the said SPA.

[19] The one year period or conditional period as stated in cl 5 of the Second Schedule of the said SPA expired on 22 December 2014. The final decision of court in the said civil suit 158 was however not delivered to the Chambers of Jesvant Singh on or before 22 December 2014, as provided in cl 5. Thereafter, the first plaintiff by a letter to the defendant's solicitors dated 23 December 2014, exercised the option to extend the conditional period, 'until such time that the Final Decision of the Court and or Judicial Decision in favour of the Vendor (Defendant) is obtained'.

[20] By a notice of termination dated 28 May 2015, issued by the Chambers of Jesvant Singh, the first plaintiff gave notice to the defendant's solicitors, Messrs Ang & Co that 'the SPA shall terminate with immediate effect' as 'there is as yet no Final Decision of the Court and/ or Judicial Decision in favour of the Vendor (the Defendant) within one (1) year from the date of the SPA'.

THE PLAINTIFFS' CLAIM

[21] In its statement of claim the plaintiffs sued the defendant, inter alia, for the following:

(a) the rescission of the said SPA; and

(b) the refund of all monies paid by them under the said SPA vis RM1m earnest deposit paid by the first plaintiff and the interest paid in the sum of RM573,950.16 paid by the second plaintiff.

THE DEFENDANT'S COUNTER CLAIM

[22] The defendant instituted a counterclaim for the following:

(a) a declaration that the first plaintiff's termination notices are null and void;

(b) a declaration that the said SPA is still valid and enforceable;

(c) an order for the specific performance of the said SPA, 'on terms to be directed by the court';

(d) further or in the alternative, payment of the RM12,754,447.70, by way of forfeiture/damages for breach of contract by the plaintiffs; and

(e) damages for breach of contract.

A THE PLAINTIFFS' CASE

[23] The plaintiffs assert that the termination of the said SPA was lawful and the demand for the refund of the earnest deposit and interest paid was in accordance with the said SPA and the MOU.

B

[24] The letter dated 23 December 2014 issued by the first plaintiff's solicitors to the defendant's solicitors constitutes a notice as required under special conditions cl 5 of the Second Schedule and cl 23.1(c) of the said SPA which extended the conditional period in relation to the delivery of the final decision of the court in the said civil suit 158.

C

[25] The said extension letter had given the first plaintiff the option to terminate the said SPA. Neither the defendant nor their solicitors had objected to the said letter. Such being the case, the defendant itself had accepted that it was only given a conditional extension of time to obtain the final decision of the court in the said civil suit 158.

D

[26] The plaintiffs contended the said extension letter dated 23 December 2014 does not vary the terms of the said SPA. It constituted notice to the defendant that the first plaintiff was exercising the option to extend the conditional period but at the same time the first plaintiff would still have the sole discretion to terminate the said SPA.

E

F

[27] The plaintiffs further contended that the said extension letter dated 23 December 2014 does not enlarge time but had only granted to the defendant a conditional extension of time to obtain the final decision of the court in the said civil suit 158.

G

[28] The plaintiffs maintain at all times, both before as well as after the issuance of the said extension letter dated 23 December 2014, that time was the essence of the said SPA.

H

[29] The plaintiff was entitled to terminate the said SPA immediately by the notice of termination and without having to give reasonable notice to the defendant before terminating the said SPA.

I

[30] The notice of termination by Messrs Pushpa Naidu & Co dated 26 October 2015 is the second notice of termination that was issued by the first plaintiff to avoid any argument by the defendant that it has not been served with any notice of termination. There is no prohibition in law from issuing two separate notices of termination to terminate the said SPA.

THE DEFENDANT'S CASE

[31] The defendant rejected the termination notice with immediate effect dated 23 December 2014 as unlawful and contrary to s 47 of the Contracts Act 1950, which requires the plaintiffs to give reasonable notice before terminating the said SPA.

[32] The said SPA is subject to the 'Final Decision of Court and/or judicial decision in favour of the defendant which shall be obtained within 1 year from the date of the said SPA'.

[33] In issuing the extension letter to extend the conditional period by one year, time is no longer of the essence and is at large. Although item (ii) of the said extension letter dated 23 December 2014 stated that, 'the Purchaser (the Plaintiff) shall continue to have at its sole discretion the option to terminate the SPA or have the option to extend the Conditional period', the exercise of the option to extend without fixing a time for performance had rendered time at large and the plaintiffs' 'sole discretion to exercise the option to terminate the said SPA' has to be exercised after giving reasonable notice.

[34] The judgment of the High Court dated 28 February 2017 in respect of the said civil suit 158 is a final judgment, although the same is under appeal.

[35] The word 'judicial decision' is not defined in the said SPA. Hence it must be construed in its plain and original meaning. Therefore, based on the High Court's judgment dated 28 February 2017, the defendant had obtained a final judicial decision.

THE HIGH COURT

Issues

[36] The learned JC addressed the following issues:

(a) whether the said extension letter dated 23 December 2014 had enlarged the time for the performance of the contract? and

(b) whether the two purported termination notices with immediate effect without giving prior reasonable notice are unlawful and invalid for being contrary to s 47 of the Contracts Act 1950?

Findings and decision

[37] The findings and decision of the learned JC may be summarised as follows.

1. Time is at large

The said extension letter dated 23 December 2014 had by such extension without fixing a time for performance of the contract, enlarged the time for the performance with the effect that time is no longer of the essence.

[38] At para 42 of the judgment, the learned JC had stated as follows:

> Based on the evidence given by witnesses during the trial and contemporaneous documents tendered in court, it is my view that when the plaintiffs exercised the option to extend the conditional period until such time the final decision and/or judicial decision is obtained, time is at large and the plaintiffs, in order to terminate the said SPA, need to give reasonable notice (*Sime Hok Sdn Bhd v Soh Poh Sheng* [2013] 2 MLJ 149; *Penang Development Corporation v Khaw Chin Boo & Anor* [1993] 2 MLJ 161).

2. Termination is unlawful

[39] The two termination notices with immediate effect issued by the plaintiffs' solicitors without giving prior reasonable notice to the defendant are unlawful and invalid and contrary to s 47 of the Contracts Act 1950. The learned JC had stated in paras 46–47 as follows:

> [46] The fact that the said extension letter dated 23 December 2014 had actually notified the defendant that in spite of the extension of time given to the defendant, 'the first plaintiff shall continue to have at its sole discretion the option to terminate the SPA', to my mind it still has to be exercised within the ambit of the law after giving reasonable notice ie s 47 of the Contracts Act 1950.
>
> [47] In the instant case, it is very clear that the letter dated 28 May 2015 from Chambers of Jesvant Singh to M/s Ang & Co giving notice to the defendant that the said SPA shall terminate with immediate effect without giving any reasonable notice, is invalid and unlawful. To my view, the said SPA is still valid and subsisting and capable of specific performance (see *Plenitude Holdings Sdn Bhd v Tan Sri Khoo Teck Puat & Anor* [1992] 2 MLJ 68).

3. Final Judgment/ Decision of Suit 158

[40] The High Court judgment in civil suit 158 is a final judgment, notwithstanding that the same is under appeal. At paras 61–66 the learned JC had stated as follows:

> [61] The next issue is whether the judgment dated 28 February 2017 is a final decision. It is not disputed by both parties that the claim by three *orang asli* against the defendant in the said civil suit 158 was dismissed by the High Court.
>
> [62] I agree with the defendant's submission that the judgment is a final judgment notwithstanding the same is under appeal. It should be noted that the said land is not subject to appeal and the defendant has registered title under its name free from encumbrances.

[63] The defendant's first witness is Dr Cheng Chean Chiong (DW1), a director of the defendant gave evidence under cross-examination that the defendant won the case against the *orang asli* and that the termination of the said SPA was unlawful (see p 61 of the notes of evidence).

[64] In the letter of extension dated 23 December 2014, the plaintiffs have exercised the option to extend the conditional period not only 'until such time that the Final Decision of Court', but until such time that the 'judicial decision' in favour of the vendor (the defendant) is obtained.

[65] I noticed the word 'Judicial decision' is not so defined in the said SPA, therefore, it is my view that it must be construed in its plain and original meaning. Hence, based on the court's judgment dated 28 February 2017, the defendant has obtained a final decision.

[41] Accordingly, the learned JC dismissed the plaintiffs' claim and allowed the defendant's counterclaim and ordered costs of RM35,000 to the defendant.

MEMORANDUM OF APPEAL

[42] The issues raised by the plaintiffs in their grounds of appeal are in relation to the following primary points:

(a) the learned JC had erred in law in holding that the extension of the conditional period of the said SPA meant that time is at large for the performance of the SPA;

(b) the learned JC had erred in holding that the two termination notices with immediate effect issued by the plaintiffs' solicitors without giving prior reasonable notice to the defendant are unlawful and invalid and contrary to s 47 of the Contracts Act 1950;

(c) the learned JC had failed to appreciate that the said SPA was expressed to be a contingent contract and accordingly, ss 32–33 of the Contracts Act 1950 applies; and

(d) the learned JC erred in his interpretation that there was a 'Final Decision of Court' in respect to civil suit 158.

OUR DECISION

[43] After careful consideration of learned counsels' written and oral submissions as well as the appeal records and relevant authorities, we were of the unanimous view that there were merits in this appeal that warranted appellate intervention. Accordingly, we allowed this appeal with costs and set aside the order of the High Court. We give our reasons for so doing below.

Contingent contracts

[44] We agree with the contention of the plaintiffs that the learned JC had failed to appreciate certain key legal issues that are pertinent to a proper construction of the said SPA. In particular, the learned JC had failed to appreciate that the said SPA was expressed to be a conditional contract that was dependent on a contingent event, ie the receipt of a final judicial decision in favour of the defendant in civil suit 158. This is expressly stated in cl 2 of the Second Schedule of the said SPA. Thus, the letter dated 23 December 2014 issued by the plaintiffs to extend the conditional period and the notice of termination dated 28 May 2015 must therefore be considered in the context of whether the contingent event had materialised to make the said SPA unconditional.

[45] The law applicable to contingent contracts are provided in ss 32–33 of the Contracts Act 1950, which are reproduced below:

> OF CONTINGENT CONTRACTS
>
> 32 Contingent contract
>
> A 'contingent contract' is a contract to do or not to do something, if some event, collateral to the contract, does or does not happen'
>
> 33 Enforcement of contracts contingent on an event happening
>
> (1) Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.
>
> (2) If the event becomes impossible, such contracts become void.

FINAL DECISION

[46] In this case the conditional event is the final outcome of the *orang asli* claim against the defendant over the subject land. The completion date for the sale was dependent on a final decision in favour of the vendor, the defendant in this appeal. Para 11 of the First Schedule of the said SPA had stated that the balance purchase price is to be paid within nine months of the purchaser's (plaintiffs) 'receipt of the Final Decision of Court'.

[47] It is to be noted that there is no timeline stipulated to when the 'final decision of the court' will take place. This is certainly beyond the power of any of the parties to ascertain. Thus, by cl 5 of the Second Schedule, the purchaser was given the option to either extend the time for the performance of the agreement or terminate the said SPA in the event a final decision in favour of the vendor (the defendant) is not given within a year from the date of the said SPA.

[48] The interpretation of what is a 'Final Decision' must be considered in the context of the Second Schedule of the said SPA (in particular, cl 5 herein) which reads as follows:

The parties hereby warrant represent and undertake as follows:

1. That there is a pending suit vide Civil Suit No NCVC-158–08/2013 in the High Court of Malaya at Johor Bahru against the Vendor and 12 others by Eddy bin Salim, Salim bin Palon and Nat bin Inder ('the Plaintiffs') for a declaration inter alia that the Plaintiffs are holders of customary rights of the Property and the adjoining lands;

2. That the Sale and Purchase shall be conditional upon the Purchaser's Solicitors receipt of a copy of the Final Decision of Court ('the Conditional Period');

3. Upon execution of the Sale and Purchase Agreement, the Purchaser's Solicitors shall hold the balance Deposit of the Purchase Price as stakeholders pending the receipt of a copy of the Final Decision of Court. The parties hereto hereby irrevocably and unconditionally authorize the Purchaser's Solicitors to release the said balance Deposit, free of interest, to the Vendor's Solicitors within fourteen (14) working days from the Unconditional Date;

4. This Agreement shall become unconditional on the date the Final Decision of Court, is received by the Purchaser's Solicitors;

5. *In the event that there is no Final Decision of Court and or judicial decision in favour of the Vendor within one (1) year from the date of this Agreement, the Purchaser shall either have the option to extend the Conditional Period or have the option to terminate this Agreement and upon notice being given to the Vendor, this Agreement shall terminate and be of no further force or effect and the Vendor shall within fourteen (14) days thereof refund to the Purchaser all sums paid by the Purchaser to the Vendor free of interest in respect of the said Property and thereafter neither party shall have any other claim against the other.* (Emphasis added.)

[49] It is clear from the words of cl 2 of the Second Schedule, reproduced above that both parties to the said SPA had intended to enter into a conditional agreement. The contingent event was stipulated to be the receipt of a 'Final Decision of Court' in the civil suit 158 within one year of the date of the said SPA.

[50] At the expiry of the first year of the said SPA, with the final decision in the *orang asli* suit not forthcoming, the first plaintiff had by its letter of 23 December 2014 given notice of extension of the said SPA but at the same time had also expressly reserved the right to terminate the said SPA. The letter of extension had made the following reservation:

> ... the Purchaser shall continue to have at its sole discretion the option to terminate the SPA or have the option to extend the Conditional Period.

[51] The defendant did not protest or dispute the terms of the extension as stated by the first plaintiff in the letter of extension of 23 December 2014. Thus, the defendant is deemed to have accepted the reservation abovementioned. The Federal Court in the case of *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441 had held that it was not open to the purchaser to take the position five months later that vacant possession was not delivered after failing to dispute the event when it occurred. The defendant could not resile from his previous conduct of accepting delivery of vacant possession on a specific date. Azahar Mohd FCJ (at para 62) had observed as follows:

> It is the ordinary nature of businessmen to immediately refute any proposition injurious to him contained in letters and not to let it stand (see *Wong Hon Leong David v Noorazman bin Adam* [1995] 3 MLJ 283; [1995] 4 CLJ 155). Thus, the previous conduct of the defendant in accepting that the delivery of vacant possession was on 21 November 2005 was plainly contrary to its new position that vacant possession was only granted on 28 February 2006.

[52] Thus, from the foregoing, it is apparent that the defendant had acknowledged the stand taken by the first plaintiff to reserve the right to terminate the said SPA during the extended period in the event that a final decision in the *orang asli* suit continues to be unavailable. It needs to be pointed out that the contingency of the agreement was a fundamental factor in the said SPA, which was likely the rationale for the parties to agree that the contingency status would not remain indefinitely, but could be terminated by the purchaser (the plaintiff) after the expiry of one year from the date of the said SPA.

[53] The further error committed by the learned JC was in determining that the decision of the High Court in the said civil suit 158 was a final judgment (at para 62 of his judgment):

> I agree with the defendant's submission that the judgment is a final judgment notwithstanding the same is under appeal. It should be noted that the said land is not subject to appeal and the defendant has registered title under its name free from encumbrances.

[54] In arriving at the above decision, the learned JC had stated as follows:

> I noticed the word 'Judicial decision' is not so defined in the said SPA, therefore it is my view that it must be construed in its plain and original meaning. Hence, based on the court's judgment dated 28 February 2017, the defendant has obtained a final judicial decision.

[55] The learned JC had erred in his finding in his failure to appreciate that on the contrary, the term 'Final Decision of Court' is expressly defined in cl 1.1 of the said SPA as follows:

> Final Decision of Court means the final and conclusive judgment or order reached by the trial court and or any Appellate or Federal courts in Malaya in favour of the Vendor in respect of the Civil Suit No 22 NCVC-158-06/2013 in the High Court of Malaya at Johor Bahru against the Vendor and 12 others by Eddy Bin Salim, Salim Bin Palon and Nat Bin Inder ('the Plaintiffs') with no further right of appeal whatsoever.

[56] It is a well-established principle of interpretation of contracts, that where a word or expression is expressly defined by the contract the court will give effect to the agreed definition in preference to the conventional meaning of the word or expression (*Lewison, The Interpretation of Contracts* (6th Ed, 2015) at p 268).

[57] A perusal of cl 5 of the Second Schedule states expressly that the expression 'Final Decision' means that 'a final or conclusive judgment' must have been reached by a trial, appellate or Federal Court with no further right of appeal whatsoever. It is not disputed that the *orang asli* plaintiffs have appealed to the Court of Appeal against the decision of the High Court (see notice of appeal at AR Vol 2C, p 419). The defendant has also appealed against the same High Court decision that gave recognition to the *orang asli* community over the lands known as Kampung Orang Asli Sungai Temon and Kampung Orang Asli Bakar Batu (see AR Vol 2C, p 424) and the surrounding land which includes the subject land. Thus, given the pending appeals in respect of the subject land, it is clear that the dispute on ownership of the subject land has not reached a final decision or been conclusively decided in favour of the defendant.

[58] Thus the learned JC had clearly erred in his finding that the High Court judgment in the civil suit 158 was 'a final judgment notwithstanding the same is under appeal'.

[59] Under ss 32 and 33 of the Contracts Act 1950, it is recognised that whilst the contingent contract remains unfulfilled, the contract remains unperformed. In the case of *National Land Finance Co-operative Society Ltd v Sharidal Sdn Bhd* [1983] 2 MLJ 211 at p 218, the respondents had agreed to sell and the appellants had agreed to buy certain immoveable property. It was a condition of the agreement that the sale should be subject to the approval of the Foreign Investment Committee (FIC). The respondents contended that the agreement became void when the Foreign Investment Committee refused to approve the sale. Salleh Abas CJ had observed (at p 218) as follows:

> It is therefore obvious that the parties have entered into a contract of sale contingent upon the approval of the transaction by the FIC over which the parties had no control. There was no promise nor guarantee that such approval would be given Such a condition, in our judgment, is more than a mere essential stipulation of the contract, a breach of which entitles an innocent party to regard itself as discharged from further performance and to sue for damages. It is, however, a condition which is known in the law of contract as a contingent condition, the effect of which is that a contract shall not take effect unless and until the condition is fulfilled ...

[60] In the case of *Ideal City Development Sdn Bhd v Dynamic Mould Sdn Bhd* [2003] 3 MLJ 152, by a sale and purchase agreement ('SPA'), the plaintiff agreed to purchase a piece of industrial land from the defendant. Clause 16 of the SPA stipulated, inter alia, that the SPA was conditional upon the relevant consent being obtained from the Foreign Committee ('FIC') within three months from the date of the SPA. In the event of the consent not being obtained within the said period, through no fault of either party, then the plaintiff had the option of either granting an extension of time for a duration of time it deemed fit or terminating the SPA, in which event all monies paid would have to be refunded immediately and the SPA would be deemed cancelled and of no effect. The FIC had refused to grant its consent for the sale of the said land. Malanjum JCA (as His Lordship then was) followed the abovementioned principle enunciated by the Federal Court in *National Land Finance Co-operative Society Ltd v Sharidal Sdn Bhd* and held that if the condition is not fulfilled, the contract lapses of its own and no question of termination arises. His Lordship observed (at p 163) as follows:

> In our view, the cut-off point is the three months requirement under cl 16(b) of the agreement unless extension is given under sub-cl (d) thereof. Further, cl 14 provides time being of the essence. Therefore, any act of the plaintiff after the expiry period should not be taken to its prejudice ... With respect, we are of the view that the conclusion of the learned judge in the court below is correct. The said letter has a condition attached and hence, it is a conditional approval which does not meet the requirement of cl 16(d) of the agreement. Thus, the reference by the learned judge to *National Land Finance Co-operative Society Ltd v Sharidal Sdn Bhd* [1983] 2 MLJ 211, is appropriate in dealing with this point. At any rate, the letter itself came after the expiry of the period stipulated in the agreement and thus rendered useless.

[61] Nevertheless, it is still open to the parties to keep the contract alive while the contingent event remains unfulfilled with the option given to either party to terminate the contract if the contingent event remains unfulfilled. This approach was approved by the Federal Court in *Yong Toi Mee & Anor v Malpac Capital Sdn Bhd & Anor* [2013] 6 MLJ 453; [2013] 8 CLJ 725. In this case, the parties by letter had agreed to an extended period. The Federal Court held that the right to terminate during the extended period would be lost if the contingent event occurred before the exercise of the right of termination. However, if the contingent event is fulfilled during the extended period, as

happened in *Yong*'s case, the contract becomes unconditional, and there would no longer be any obstacle to decreeing specific performance.

[62] In the instant case, the learned JC was plainly misconceived when His Lordship decreed specific performance of the said SPA, although the contingency event remain unfulfilled, in that the dispute as to the ownership of the subject land remains unresolved with two appeals pending in the Court of Appeal. The learned JC had failed to appreciate that even to date, the vendor (the defendant) would not be able to deliver an unencumbered title or unencumbered vacant possession of the subject land to the purchaser (the plaintiffs).

Reasonable notice

[63] A further error made by the learned JC was in making the finding that by extending the conditional period, the plaintiffs had enlarged the time for performance. The learned JC proceeded to hold that the plaintiffs' termination of the said SPA was unlawful on the grounds that the first plaintiff had failed to give reasonable notice to terminate the said SPA, as envisaged by s 47 of the Contracts Act 1950.

[64] The learned JC had failed to appreciate that the requirement of a reasonable notice under s 47 of the Contracts Act 1950 does not apply to contingent contracts, which is what the said SPA expressly stated to be in cl 2 of the Second Schedule of the said SPA. By s 33 of the Contracts Act 1950, if the contingent event does not happen within the stipulated time, the contract becomes void without notice. Conversely, if the contingent event does happen within the stipulated time, then the contract proceeds for performance on its express terms. A conditional contract subsists without the need for any notice to be given. The legal position is stated in *Visu Sinnadurai, Contracts Act: A Commentary* (LexisNexis 2015) at p 344 as follows:

> As seen above, a contingent condition is a provision in a contract to the effect that the contract is not to take effect unless and until the condition is fulfilled, and the non-fulfilment of the condition does not render either party liable in damages to the other ... If the contract is contingent or conditional, the rights of the parties are suspended until the conditions identified are satisfied and the agreement can then be completed. Unless and until the conditions have been fulfilled, the agreement simply does not take effect.

[65] Thus, we are of the view that the learned JC had wrongly invoked s 47 of the Contracts Act 1950 as the same is not concerned with notice of termination but time for performance. Section 47 reads as follows:

47 Time and Place for Performance

Time for performance of promise where no application is to be made and time is specified

Where, by the contract, a promisor is to perform his promise, and no time for performance is specified, the engagemtent must be performed within a reasonable time.

Explanation — The question 'what is a reasonable time' is in each particular case a question of fact.

[66] In the case of *Sime Hok Sdn Bhd v Soh Poh Sheng* [2013] 2 MLJ 149, the Federal Court observed in relation to s 47, that even in respect of a performance, a notice is not mandatory. Section 47 merely states that in a contract where no specific time is stipulated, performance has to be made within a reasonable time. The Federal Court (Jeffrey Tan FCJ) had observed (at para 27) as follows:

> But such notice is not necessary to crystallise the antecedent breach of the party in default. Section 47 rovides that 'Where by the contract, a promisor is to perform his promise without application by the promise, and no time for performance is specified, the engagement must be performed within a reasonable time'. The promise is discharged if the engagement is performed within a time which is reasonable under the existing circumstances (*Hick v Raymond and Reid* [1893] AC22). If the promise is not performed within a reasonable time, then there is default. It is as straightforward as that.

[67] Thus, s 47 is not concerned with termination of contracts or reasonable notice of termination. Section 47 is a declaration that in contracts where no specific time is stipulated for performance, the performance must nevertheless be undertaken by the relevant party within a reasonable time. Thus, the learned JC's finding that the said SPA was wrongfully terminated for breach of s 47 of the Contracts Act 1950 is unsustainable in law.

[68] In the circumstances, in the light of two pending appeals in respect of the rights over the subject land by the plaintiffs and the defendant, the order of the High Court for specific performance of the said SPA is clearly unmaintainable in law. The termination of the said SPA by the plaintiff was lawful as the SPA was conditional on the occurrence of the contingent event ie the receipt of a final decision in respect of the dispute between the *orang asli* and the defendant over the subject land. Since the contingent event has not materialised, the said SPA has lapsed. In the alternative, even if there was a subsisting SPA, the plaintiffs had lawfully elected to exercise the option to terminate the SPA.

[69] For all the reasons stated above we allowed this appeal with costs subject to allocator and set aside the order of the High Court. Accordingly, we ordered

the defendant to refund all monies paid by the plaintiffs under the said SPA vis RM1m earnest deposit paid by the first plaintiff and the interest paid in the sum of RM573,950.16 paid by the second plaintiff.

[70] In consequence the defendant's counter claim is dismissed. We award costs here and below of RM60,000 to the plaintiffs/appellants.

Appeal allowed; decision of High Court set aside; appellants' claim allowed; respondent's counterclaim dismissed.

Reported by Ashok Kumar